Supreme Court, U.S.
FILED
OCT 12 1994
OFFICE OF THE

No. 94-171

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES L. TOLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly instructed the jury that it could infer knowledge from deliberate ignorance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 17 F.3d 745.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1994. Petitions for rehearing were denied on April 29, 1994. Pet. App. 59a-60a. The petition for a writ of certiorari was filed on July 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to commit certain offenses against the United States in order to obtain money and property from savings and loan institutions through fraudulent real estate loans, in violation of 18 U.S.C. 371; one count of conspiring to participate in the conduct of the affairs of an enterprise through a pattern of racketeering, in violation of 18 U.S.C. 1962(d) (RICO); eight counts of submitting appraisals overvaluing property to a savings and loan, in violation of 18 U.S.C. 1014; twelve counts of receiving fraudulently obtained bank funds, in violation of 18 U.S.C. 1006; nine counts of misapplication of savings and loan funds, in violation of 18 U.S.C. 657; and seven counts of wire fraud, in violation of 18 U.S.C. 1343.[1] He was also found to have acquired and maintained $38 million in violation of RICO, pursuant to 18 U.S.C. 1963. Petitioner was sentenced to twenty years' imprisonment, to be followed by five years of supervised probation. He was also ordered to forfeit $38 million and pay a fine of $220,000. Gov't C.A. Br. 5-6. The court of appeals affirmed. Pet. App. 1a-58a.

1. Petitioner and co-defendant David Faulkner were real estate developers who, from 1982 to 1983, participated in a scheme to enrich themselves and others

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[1] Petitioner was indicted on these charges in the Northern District of Texas in 1987. After a seven-month trial in Lubbock, Texas, the court declared a mistrial. The case was transferred back to Dallas, but after several days of voir dire, the court dismissed the panel because of concerns about pretrial publicity. The court then granted change of venue motions filed by petitioner and three of his co-defendants, and transferred the case to the Western District of Texas. Pet. App. 9a-10a; Gov't C.A. Br. 2-5.

— by well over $100 million — through fraudulent real estate loans from savings and loan institutions.[2] Petitioner and Faulkner orchestrated the scheme, which involved land in an area off Interstate 30 in Dallas. They assembled and bought large pieces of property outright or on option. They ultimately resold the land to builder-investors at inflated prices in a series of "land flips," in which the property rapidly changed hands several times, each time increasing in price. In addition, by subdividing the large parcels of land, they were able to sell them at a large profit. Pet. App. 2a-3a; Gov't C.A. Br. 6-7.

For example, on July 30, 1982, petitioner, through his company Dallas American Research, purchased approximately 31 acres of land for $0.75 per square foot. Over the next four months, the land went through a series of transfers, to petitioner and Faulkner, to another of petitioner's companies, and to a company owned by co-conspirators Ken Cansler and Cliff Sinclair. The undeveloped land was finally resold in 16 tracts on November 9, 1982, for $7.50 per square foot. Petitioner and Faulkner made $3.3 million on the deal. Gov't C.A. Br. 27-28.

Petitioner's and Faulkner's bank fraud scheme depended upon the participation of appraisers and bankers. The appraisers prepared inflated appraisals that supported the escalating land prices and enabled the buyers to obtain larger and larger loans for the properties. The savings and loan officers agreed to have their institutions make the necessary loans for the sales

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[2] Petitioner's three co-defendants have all filed petitions for writs of certiorari. One of those petitions, *Faulkner* v. *United States*, No. 94-100, was denied on October 3, 1994. Two others are still pending. See *Blain* v. *United States*, No. 94-5417; *Formann* v. *United States*, No. 94-5557.

and resales of the land, as well as for the construction of condominiums on the properties. They charged excessive points and development reserves on loans, which made their institutions appear healthier than they were; they renewed loans already in default; they illegally benefitted in various ways from their own institutions' loans; and they participated in land transactions designed to earn them profits. They also financed new, larger loans on condominium projects that had not been sold and on land so seriously overvalued that no project could succeed. Pet. App. 3a-7a; Gov't C.A. Br. 7-8.

Petitioner and his associates used the land sales and loans to benefit themselves and their friends. Commissions were frequently paid to people without any connection to the land sales other than their relationships to the conspirators. Many sales were structured in order to funnel large sums of money to petitioner's or Faulkner's families or to one of the other conspirators — for example, the bankers funding the deals were always amply rewarded. Pet. App. 4a-6a; Gov't C.A. Br. 7-8.

As a result of the scheme, a number of savings and loan institutions lost millions of dollars and were closed by the government. Empire Savings and Loan Association, for example, lost more than $300 million in bad loans. The government ended up repaying the bank losses incurred by insured depositors. In addition, most of the property and developments went into foreclosure. Petitioner made $38 million as a result of the scheme. Pet. App. 8a-9a; Gov't C.A. Br. 8.

2. At trial, petitioner testified that he was an experienced real estate developer who was simply taking advantage of a booming market by buying large tracts of land for low prices and reselling them at higher prices to others eager to be a part of that market. He disclaimed knowledge of the details of most of the land transactions.

He also denied knowledge of, or participation in, any fraudulent transactions, any bribes to the bankers, and any misrepresentations. In addition, he claimed to know little about his co-defendants' activities. He disclaimed knowledge of Empire Saving and Loan president Spencer Blain's involvement in a number of land transactions in which petitioner was also involved. He also disclaimed knowledge of the fact that Paul Jensen, who controlled two savings and loans that funded many of the loans in the scheme, profited from his mortgage companies' processing of loans for those savings and loans. Pet. App. 6a-7a; 27 Tr. 44, 58, 197; see Gov't C.A. Br. 26-27.

3. At trial, the district court gave the following instruction:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit [a]n inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Pet. App. 35a-36a.

At petitioner's request, the court instructed the jury on petitioner's theory of the case. The court instructed the jury that petitioner denied that he had misrepresented or conspired to misrepresent anything to a

lending institution or regulatory agency and denied that he bribed or provided any illegitimate payments to any bankers. The instruction stated that petitioner claimed that he "was a businessman dealing at arm's length with the savings and loans or their representatives, and that . . . he was entitled to sell land to those institutions at any price they were willing to pay, and to benefit from any loans they were willing to make to borrowers who were buying land from him." Pet. App. 39a n.32.

Petitioner was convicted of conspiracy, RICO conspiracy, and 39 substantive counts. He was acquitted of five substantive counts. See 4 R. 724-732.

3. The court of appeals affirmed. Pet. App. 1a-58a. The court first noted that the "deliberate ignorance" instruction should only be given when the evidence shows that "(1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct." *Id.* at 36a (quoting *United States* v. *Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992), cert. denied, 113 S. Ct. 1291 (1993)). The court then rejected petitioner's claim that the second element of the test requires evidence of affirmative acts to avoid knowledge. Pet. App. 36a-37a. In some cases, the court stated, "the likelihood of criminal wrongdoing is so high, and the circumstances surrounding a defendant's activities and cohorts are so suspicious, that a failure to conduct further inquiry or inspection can justify the inclusion of the deliberate ignorance instruction." *Id.* at 37a. The court concluded that the facts of the real estate transactions in this case "were extraordinarily suspicious," citing 15 such facts of which petitioner was aware. *Id.* at 37a-39a. Given these circumstances, the court held, there was no error in the inclusion of the deliberate ignorance instruction. *Id.* at 40a. The

deliberate ignorance instruction is appropriate where, as here, a defendant claims a lack of guilty knowledge and the evidence at trial supports an inference of deliberate indifference.[3] *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4-5, 12-17) that the district court erred in instructing the jury on deliberate ignorance because the government's theory and evidence pointed to actual knowledge, not deliberate acts to avoid knowledge, and because the district court's formulation of the standard required nothing more than recklessness. He argues (Pet. 9-17) that the courts of appeals are divided over when an instruction on deliberate ignorance may appropriately be given, and that the instruction could not have been given in this case had it arisen in other circuits.

1. The "deliberate ignorance" instruction given in this case informed the jury that the element of knowledge "may be satisfied by inferences drawn from proof that [petitioner] deliberately closed his eyes to what would otherwise have been obvious to him." Pet. App. 35a. The instruction thus informed the jury of an inference that they were permitted — but not required — to draw in determining whether petitioner had the requisite knowledge for conviction. Because a permissive inference "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof," it is invalid "only if, under the facts of the case, there is no

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[3] The court of appeals rejected most of petitioner's other arguments, and affirmed his judgments of conviction and sentences on all but four counts of wire fraud. Pet. App. 58a. It reversed petitioner's convictions on those four counts on the ground that the evidence was insufficient to sustain the verdicts. *Id.* at 53a.

rational way the trier could make the connection permitted by the inference." *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 157 (1979).

a. The facts of this case amply provided a basis for the inference authorized by the instruction at issue. The scheme that formed the basis of the charges in this case required the rapid turnover of land — sometimes within a matter of days — at enormous profits. In order to succeed, the scheme required that those who were paying the inflated prices be able to secure financing for their purchases. That in turn required that the appraisals on which the financing was based be inflated and that the bankers who were providing the financing be given substantial rewards to make improper loans on the basis of what was in fact dramatically overvalued collateral. As petitioner concedes (Pet. 6-7), he testified at trial that he did not know of two crucial elements of the scheme — that the appraisals were overvalued and that the bankers were being given millions of dollars to defraud their institutions and misapply funds belonging to their institutions.

In evaluating the evidence in this case, the jury could have believed petitioner and other witnesses, for example, who testified that the appraisers had never informed him that their appraisals were fraudulent. See Pet. App. 43a-44a (referring to testimony of appraisers that developers asked for appraisals and informed the appraiser of the loan amount; the appraiser did not expressly say that the appraisal would be falsified). But the jury could have found it significant that petitioner did not inquire why land that he had very recently purchased was appraised at many times the price he paid when it was sold — sometimes a matter of hours or days later. As the court of appeals noted, the evidence showed that "even when properties were bought and sold in rapid

succession, sometimes on the same day, the appraisals were always high enough to support the loans." *Id.* at 38a. Indeed, they were high enough to permit the buyers to "walk[] away from the closing with cash in their pockets and a loan large enough to pay all closing costs and future interest payments for some period of time." *Ibid.* The sales "never fell through due to lender concern about the * * * value of the property pledged as collateral." *Id.* at 39a.

In those circumstances, the jury could have taken petitioner's failure to inquire into the incredible inflation of value reflected in the appraisals as an effort — in the words of the instruction — to "deliberately close[] his eyes to what would otherwise have been obvious to him." Pet. App. 35a. And the jury reasonably could have concluded that his effort to avoid looking into the appraisals was a reflection of his own knowledge that they were fraudulent. Similar extraordinarily suspicious circumstances attended the payments of millions of dollars to the bankers,[4] and the jury similarly could have concluded that, even if petitioner attempted to insulate himself by avoiding direct inquiry, his failure to inquire was indicative of his actual knowledge of the payments and their purpose.

b. To be sure, the jury could also have concluded that petitioner's failure to ask about the highly suspicious circumstances was the result of naivete, negligence, or

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[4] For example, co-defendant Blain, who controlled one of the key savings and loans that made loans in connection with the scheme, purchased land with petitioner's assistance in August and September of 1982 for $686,000. He sold it to co-conspirator Sinclair in February of 1983 for at least $14.9 million. Pet. App. 5a. See also *id.* at 51a (discussing payoff to Blain of Lear jet, condominium, and $3 million in connection with another transaction).

some other factor, rather than the kind of deliberate failure to inquire that is characteristic of actual knowledge. That, however, does not suggest that the instruction given in this case was faulty. The instruction was carefully framed to protect petitioner against any implication that the jury was required to infer petitioner's actual knowledge — rather than merely his naivete, negligence, or some other factor — from his failure to inquire. Throughout the instruction, the court used permissive, not mandatory, terms: "[t]he element of knowledge *may* be satisfied"; "[a] finding * * * of a conscious purpose to avoid enlightenment would *permit* [a]n inference of knowledge"[5]; "a defendant's knowledge of a fact *may be inferred.*" Pet. App. 35a-36a (emphasis added). To emphasize the point, the court expressly added: "It is entirely up to you [the jury] as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence." *Id.* at 36a.

The instruction also made clear that, although the jury was entitled to infer knowledge from circumstantial evidence such as evidence of petitioner's "willful blindness," the jury ultimately had to find that petitioner had actual knowledge of the relevant facts before it could find him guilty. The instruction stated that "[a] showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge." Pet. App. 36a. Thus, contrary to petitioner's claim (Pet. 14) that the instruction "suggests the existence of an affirmative

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[5] The instruction also ensured that the jury would not be confused about the government's evidentiary burden; the jury was informed that "[a] finding *beyond reasonable doubt* of a conscious purpose to avoid enlightenment" would support the inference. Pet. App. 35a (emphasis added).

duty to investigate suspicious circumstances," the instruction merely informed the jury that, where a failure to inquire in the face of highly suspicious circumstances is present, it may — not must — be evidence of actual knowledge of the facts not investigated.

c. In any event, even if the instruction were not supported by the record in this case, its use would not warrant the reversal of petitioner's convictions. Petitioner's claim is not that the instruction is an incorrect statement of the law, but that it was not warranted by the facts of this case. So long as there was sufficient evidence to convict petitioner and the jury was otherwise correctly instructed, however, the submission to the jury of a theory that was unsupported by the facts of the case would not warrant reversal. *Griffin* v. *United States*, 112 S. Ct. 466 (1991). As the Court explained in *Griffin*, "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law," and therefore when a case is submitted to them on an incorrect legal theory on which they may have relied, the resulting conviction should be reversed. But "[q]uite the opposite is true * * * when [the jurors] have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence." *Id.* at 474. In those circumstances, the Court adopted the Seventh Circuit's position that a verdict should not be reversed "merely on the chance — remote, it seems to us — that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient." *Ibid.* (quoting *United States* v. *Townsend*, 924 F.2d 1385, 1414 (1991)).

2 Petitioner is correct (Pet. 9-16) that the circuits have adopted a variety of approaches to the question of when instructions concerning deliberate ignorance may be given. Many of those approaches, however, concern the use of a deliberate ignorance instruction that differs significantly from the instruction given here, and the cases cited by petitioner that involve a similar instruction do not conflict with the decision below.

Many of the cases cited by petitioner involve the use of an instruction that derives from the Model Penal Code § 2.02(7) (1985). That instruction does not merely call the jury's attention to a permissive inference; instead, it provides that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." See, *e.g.*, *United States* v. *Rodriguez*, 983 F.2d 455, 457 (2d Cir. 1993); *United States* v. *Barnhart*, 979 F.2d 647, 649-650 (8th Cir. 1992); *United States* v. *de Francisco-Lopez*, 939 F.2d 1405, 1410 n.2, 1411 (10th Cir. 1991); *United States* v. *Murrieta-Bejarano*, 552 F.2d 1323, 1324 n.1 (9th Cir. 1977); cf. *United States* v. *Jewell*, 532 F.2d 697, 704 n.21 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976). That courts have ruled that instruction invalid (or valid) has little bearing on the question whether the permissive inference instruction given in this case was appropriate.[6]

In two cases cited by petitioner, courts of appeals held that permissive inference instructions concerning deliberate ignorance were improper. Neither case

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[6] The validity of the Model Penal Code instruction was at issue in *Tomala* v. *United States*, 112 S. Ct. 1997 (1992), in which the United States acquiesced in the petition for certiorari with respect to that issue. This Court nonetheless denied the petition.

directly conflicts with the decision of the Fifth Circuit in this case.

a. In *United States* v. *Mapelli*, 971 F.2d 284 (9th Cir. 1992), the defendant was charged with income tax evasion. She and her husband owned a wholesale meat firm that "skimmed" cash revenues without reporting them on its tax returns. The jury instruction concerning deliberate ignorance was virtually identical to the instruction given in this case. The Ninth Circuit reversed the resulting conviction, on the ground that "[t]he instruction is inappropriate where the evidence could justify one of two conclusions, either that the defendant had knowledge, or that the defendant did not, but not a third conclusion, that the defendant deliberately shut her eyes to avoid confirming the existence of a fact she all but knew." *Id.* at 286. The court also concluded that the instruction was not harmless error. *Id.* at 287.

There is no indication at present that the legal standard articulated by the Ninth Circuit would lead to different results than the standard articulated by the court below. The Ninth Circuit stated that the instruction should not be given if the evidence is insufficient to justify a conclusion that "the defendant deliberately shut her eyes to avoid confirming the existence of a fact she all but knew." The Fifth Circuit stated that the instruction may be given "where a defendant claims a lack of guilty knowledge and the evidence at trial supports an inference of deliberate indifference." Pet. App. 40a. Although those two formulations differ, it is not clear that applying those two formulations would produce different outcomes.

Nor do the facts of *Mapelli* suggest that the Ninth Circuit would have decided this case differently. In contrast to this case, the Ninth Circuit held the

instruction improper in *Mapelli* primarily because of facts that tended to show that the transactions at issue were not highly suspicious to the defendant, and therefore would not have justified a conclusion that she "deliberately shut her eyes." 971 F.2d at 286. The court explained that, although she worked with her husband at the firm, "her company responsibilities and hours were limited," she had no previous training in accounting, and the firm's accounting system was "complicated." *Ibid.* She had not destroyed the records necessary to account for the unreported cash revenues; her husband had done that. Nor, in the court's view, was there anything highly suspicious about the defendant's frequent currency deposits into a joint checking account she maintained with her husband; because she and her husband "owned the business, they were entitled to the money and there was nothing wrong with their taking money out of the company, in currency or any other form." *Id.* at 287.

Those circumstances differ substantially from the facts of this case. Unlike the defendant in *Mapelli*, petitioner was one of two individuals who masterminded the fraudulent scheme. Petitioner had a sophisticated understanding of the real estate development business, and he was in a position directly to observe the crucial facts: the dramatic increases in the appraised value of property in the brief interval between its original purchase and its ultimate sale, and the transactions that enriched the bankers who participated in the conspiracy. Petitioner therefore could readily be seen as deliberately closing his eyes to details of the fraudulent scheme that he already knew.

b. Petitioner also relies on *United States* v. *Giovannetti*, 919 F.2d 1223 (7th Cir. 1990). In that case, the defendant owned a house that was leased to a "wireroom," and he was convicted of aiding and abetting

the conducting of an illegal gambling business. The trial court instructed the jury in somewhat different terms from those used in this case; the jury was told that

> [y]ou may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear that he would learn, you may conclude that he acted knowingly.

Id. at 1226. The Seventh Circuit recognized that the instruction "is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings." *Id.* at 1228. The court also recognized that "the deliberate effort to avoid guilty knowledge * * * can be a mental, as well as a physical, effort — a cutting off of one's normal curiosity by an effort of will." *Id.* at 1229.[7] Since there was no evidence of "either sort of effort" in the case before it, the Seventh Circuit held that the instruction was inappropriate. *Ibid.* The court did not reach the merits of the harmless error issue, since it held that the government had waived that issue. *Ibid.*

The Seventh Circuit's decision in *Giovannetti* does not conflict with the decision in this case. First, the instruction that was given in *Giovannetti* is less explicit on the permissive character of the inference involved than was the instruction given in this case, and,

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[7] Petitioner thus errs (Pet. 14) in viewing *Giovannetti* as requiring an affirmative "act" to avoid learning the truth. A "mental effort" is also sufficient under that case. 919 F.2d at 1229.

unlike the instruction given in this case, it does not warn the jury that it may not convict based merely on proof of negligence. Second, the standard applied by the Seventh Circuit would appear to have been satisfied in this case. The Fifth Circuit's observations about the extraordinarily suspicious circumstances surrounding the transactions amount to a holding that, on the facts of this case, the evidence would have warranted the jury in concluding that petitioner deliberately "cut[] off [his] normal curiosity [concerning the fraudulent appraisals and payments to banking officials] by an effort of will."

In any event, since *Giovannetti*, the Seventh Circuit has refined its position on when an instruction on deliberate ignorance may be given. In *United States* v. *Crabtree*, 979 F.2d 1261 (7th Cir. 1992), cert. denied, 114 S. Ct. 216 (1993), the defendants — a bank officer and a friend of his — were charged with misapplication of bank funds in connection with a scheme to have nominees take out loans from the bank for the benefit of a firm in which the defendants had an interest. *Id.* at 1263. The court held that the jury had properly been instructed that "guilty knowledge can be inferred from a combination of suspicion and deliberate ignorance."[8] *Id.* at 1269. The court stated that such an instruction is proper when, taking the record in the light most favorable to the government under an abuse of discretion standard, "a defendant claims a lack of guilty knowledge and there are facts and evidence that support an inference of deliberate ignorance." *Id.* at 1270 (internal quotation marks omitted). Under that standard, which is similar to the

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[8] The quotation is the court's explanation of the instruction. The court of appeals did not provide the exact wording of the instruction that was given.

standard employed by the Fifth Circuit in this case, the instruction given in this case was appropriate.

3. Even if the disputed instruction were not supported by the facts of this case — and even if giving such an instruction could in some circumstances require reversal of a conviction — this Court's review is not warranted, because any error would have been harmless in view of the overwhelming evidence against petitioner.

Co-conspirator Cliff Sinclair testified about a number of occasions on which petitioner directly participated in the fraudulent transactions. Early in the scheme, Sinclair warned petitioner that Nes Nesbit could not afford to purchase the land petitioner wanted to sell him. Gov't C.A. Br. 15. Petitioner suggested that Nesbit form a corporation into which petitioner and Faulkner would put money, thereby enabling Nesbit to buy and obtain land loans. *Ibid.* Banker Tommy Nelson testified that when he approached petitioner and Faulkner about his need to sell the Cabanas (one of the developments at issue), petitioner said that they would get Nelson out of the Cabanas if Nelson's bank would fund Bahama Glen, another land transaction in Dallas. *Id.* at 37. Petitioner then found buyers for all but one Cabanas building, arranged for funding by Empire, and received $1.4 million for his assignment of the original contract to purchase Bahama Glen. *Id.* at 37-38.

Nelson also testified that petitioner and Faulkner approached him about funding co-defendant and savings and loan principal Blain's purchase from them of a development called Chalet Ridge. The development in fact cost Blain $686,000. Petitioner gave Blain's false financial statement (which included a fraudulent appraisal of Chalet Ridge) to Nelson, vouched for Blain's credentials, and falsely claimed that Blain needed the funds to refinance some property. Gov't C.A. Br. 34-35.

Nelson made the loan in the amount of $2.25 million, the proceeds of which were used in part to repay petitioner and Faulkner for personal loans they had made to Blain to enable him to buy the savings and loan. *Id.* at 35. Petitioner was also deeply involved in working out the arrangements whereby Blain ultimately was paid off for his services, when he sold the development for almost $15 million six months later. *Id.* at 35-36. See note 4, *supra.*

The courts of appeals agree that even if the district court erred in instructing the jury on deliberate ignorance, a conviction may be affirmed if the evidence was overwhelming, such that a court can conclude that the error was harmless. See, *e.g.*, *United States* v. *Adeniji*, 31 F.3d 58 (2d Cir. 1994); *United States* v. *Cartwright*, 6 F.3d 294, 301 (5th Cir. 1993), petition for cert. pending, No. 94-5410; *United States* v. *Barbee*, 968 F.2d 1026, 1033-1035 (10th Cir. 1992); *United States* v. *Barnhart*, 979 F.2d 647, 652-653 (8th Cir. 1992); *United States* v. *Rivera*, 944 F.2d 1563, 1572 (11th Cir. 1991); *United States* v. *Sanchez-Robles*, 927 F.2d 1070, 1074-1075 (9th Cir. 1991). That standard was satisfied here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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